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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 895

MICHAELS ENTERPRISES, INC., AND JAMES A. MICHAELS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals on remand is not yet reported. The prior opinion is reported at 321 F.2d 913, and this Court's remand at 376 U.S. 356.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1965. The petition for a writ of cer-

tiorari was filed on February 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court of appeals complied with the mandate of this Court in 376 U.S. 356.

2. Whether the correctness of the instructions is before the Court and, if so, whether the trial court committed plain error therein with regard to the matter of criminal intent.

STATUTES INVOLVED

26 U.S.C. 5124(a) provides:

> (a) Receipts.
>
> Every retail dealer in liquors and every retail dealer in beer shall provide and keep in his place of business a record in book form of all distilled spirits, wines, and beer received, showing the quantity thereof and from whom and the dates received, or shall keep all invoices of, and bills for, all distilled spirits, wines and beer received.

26 U.S.C. 5146(a) provides:

> (a) Preservation and inspection of records.
>
> Any records or other documents required to be kept under this part or regulations issued pursuant thereto shall be preserved by the person required to keep such records or documents, as the Secretary or his delegate may by regulations prescribe, and shall be kept available for inspection

by any internal revenue officer during business hours.

26 U.S.C. 5603(b) provides in pertinent part:

> (b) Failure to comply.
>
> Any person required by this chapter * * * to keep or file any record, return, report, summary, transcript, or other document, who, otherwise than with intent to defraud the United States shall
>
> > (1) fail to keep any such document or to make required entries therein; or
> >
> > * * * *
> >
> > (5) fail [or] refuse to preserve or produce any such document, as required by this chapter or regulations issued pursuant thereto;
>
> or who shall, otherwise than with intent to defraud the United States, cause or procure the same to be done, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, for each such offense.

STATEMENT

Petitioners were indicted in the United States District Court for the Eastern District of Missouri for (1) failing and refusing to produce upon lawful demand documents required to be kept by retail liquor establishments, in violation of 26 U.S.C. 5603(b)(5), and (2) failing to keep such documents and make required entries therein between August 29, 1959, and August 31, 1961, in violation of 26 U.S.C. 5603(b)(1) (R. 1-3). They were convicted by a jury on both

counts. The court sentenced the individual petitioner to imprisonment for one year on count 1 and to a fine of $1,000 on each count. It sentenced the corporate petitioner to a fine of $1,000 on each count (R. 23-24, 37-38). The court of appeals affirmed, 321 F.2d 913 (Pet. App. A). This Court, noting that the court of appeals was under the misapprehension that petitioners had not moved for acquittal at the close of all the evidence, reversed *per curiam* and remanded the case for consideration of the sufficiency of the evidence, 376 U.S. 356. Upon remand, the court of appeals reversed the convictions of petitioners on count 2 and affirmed their convictions on count 1 (Pet. App. B).

1. THE TRIAL.

The evidence showed that on August 29, 1961, two agents of the Alcohol and Tobacco Tax Unit entered petitioners' bar in St. Louis and asked to examine invoices of purchases of alcholic beverages. There were some five to ten invoices on the back bar. The manager said that he had no key to the basement doors, which were locked, and that he did not know where the invoices were kept (Tr. 18-23). Petitioners' attorney later asked that the agents return the next day, when petitioner Michaels, president of the company bearing his name, would be available (Tr. 24).

On August 30, when the agents returned and asked Michaels for his purchase invoices on liquor, wine and beer, or a record of them, Michaels replied, "I will have to dig them up. They are around here some place" (Tr. 25). They went to the basement, but the

records were not found. A door marked "office" was locked and Michaels said he did not have a key. Michaels made several telephone calls and then told the agents he did not believe that they were entitled to inspect the premises. After one of them explained the law to him, Michaels said that he was going to see his lawyer and that he would obtain a key for the locked door. He left, at about 4:30 p.m. Petitioners' attorney called and was asked to communicate with Michaels. The agents waited until about 11:30 p.m., but Michaels did not return (Tr. 27-33, 66). Michaels, testifying for the defense, said that he had come in from his farm, about a hundred miles distant, and did not know yet where the invoices were; that he told the agents that "a lot of the stuff" had been "cleaned out" from the premises because it had become "wet and sloppy" in a flood (Tr. 185-187); that he returned to his farm and found the key in a coat pocket, and that he came back to town after midnight (Tr. 188-189).

On August 31, in the early afternoon, Michaels and his attorney were present at the bar, together with the three agents, who asked to complete their inspection. The agents were asked to wait awhile. After about a half hour they were allowed to enter the office, but found no invoices. Michaels then brought down a cardboard box from on top of some old furniture in another part of the basement and turned it over to the agents (Tr. 34-35, 56, 68). The box, together with two envelopes which were brought to the agent later, contained 20 liquor purchase invoices for the preceding two years, as well as 17 liquor invoices

which antedated that period (Tr. 68-73, 79). In answer to a request for the balance of the invoices, Michaels said he had no more and suggested that they had been destroyed by a flood (Tr. 61-62).

At the trial Michaels testified that the basement had been flooded six or eight times, and that on June 23, 1961, he called a plumbing company which made repairs. The invoices had been on the floor in cartons and were removed after the flood because of their damaged condition (Tr. 190-194). Records of the Dependable Plumbing Company confirmed the June 23 visit (Tr. 144). Another witness testified as to sewer trouble and flooding on the premises (Tr. 148-151, 153-154).

The government proved that 450 purchase invoices for liquor, wine and beer were received by petitioners over the two-year period covered by the indictment (Tr. 74-75, 86-89, 90-111; Pet. App. B 6). Michaels was shown some 69 delivery copies of invoices representing purchases by the establishment after June 23, 1961, and before August 31, for which he had failed to produce copies at the time of the inspection (Tr. 207-212; Pet. App. B 6). Michaels testified that they had no "set policy" about invoices. Any employee present would sign them. Once a month they would be picked up and sent with other information to the company's accountant. When he returned them, they would be placed downstairs in a box. He did not know he was required to keep them except for bookkeeping purposes, but he, in fact, always kept them. He had been in the tavern business since 1951 or 1952 (Tr. 198-203).

The court instructed that it was the government's position that petitioners "knowingly failed and refused to preserve and produce documents and records in book form or invoices" and that they "knowingly failed to keep and file" such records (Tr. 251). The court also instructed that if the jury should find that the books and records were damaged and destroyed by agencies or events entirely outside the control of these defendants, they should acquit (Tr. 252-253). There were no exceptions to the charge and no request for an instruction as to intent.

2. THE APPELLATE PROCEEDINGS.

On the first appeal, the court of appeals gave careful consideration to all assignments of error.[1] With regard to the claimed duplication of charges by the indictment, the court concluded that the evidence sub-

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[1] These were set forth in the opinion as follows (Pet. App. A 3).

> (1) It was plain error for the Court to fail to instruct on intent;
>
> (2) It was plain error for the trial Court to fail to instruct the jury on the elements of the offense, or to tell the jury what it must find in order to convict the defendants;
>
> (3) Count 1 of the indictment was insufficient to inform the defendants of the charge against them;
>
> (4) As the defendants were convicted (on) Count II for failing to keep records * * * their conviction on Count I for failing to produce records for inspection by agents (of the Alcohol and Tobacco Tax Unit, when requested) cannot stand, since they cannot be convicted of failure to produce that which they did not keep or have; and
>
> (5) The evidence as to intent was insufficient to sustain the verdicts. (Par. added.)

stantiated both the charge of failure to keep some records and the charge of wilful failure to produce other records actually preserved. The opinion erroneously stated, however, that appellants had not moved for an acquittal at the close of the evidence and, hence, that no question of the sufficiency of the evidence could be raised. This Court, finding the critical issue to be "whether the record contains sufficient evidence of violations of the two counts to support the imposition of nonconcurrent sentences" and pointing out that there had been a motion for judgment of acquittal, remanded to the court of appeals "for consideration of the sufficiency of the evidence." 376 U.S. 356, 357.

On remand, the court of appeals reached the conclusion that the evidence did not support the conviction for failure to keep records, either before or after the flood (Pet. App. B 8-10). On the other hand, pointing to the fact that Michaels should have had 69 invoices after the flood, and produced only 20, and to petitioner's evasive conduct, the court found that it was "a very reasonable inference, fairly established beyond any reasonable doubt," that some invoices retained by appellants in their possession after the flood were knowingly not produced for inspection (Pet. App. B 9, 10-11). The court accordingly reversed the convictions on count II and affirmed the convictions on count I.

ARGUMENT

1. The disposition of the case by the court of appeals was in accord with the remand by this Court

which directed a consideration of the sufficiency of the evidence. Petitioners now argue that the evidence was sufficient to show that they kept no records—and are therefore guilty under count II, but innocent of count I. The defense testimony at the trial, including the testimony of Michaels was, however, to the contrary, and their motion for judgment of acquittal argued to the contrary. They can scarcely complain that the court, on reexamination of the record, found that the government had not offered sufficient evidence to rebut their affirmative testimony that they did keep records which, for the most part, were destroyed by the flood.

There was ample evidence to show that petitioners knowingly failed to produce records. After a delay of three days petitioners produced thirty seven invoices, only 20 of which were for the period after the flood, although 69 had been received during that time. It could be inferred from Michaels' evasive conduct that the failure to produce the records was intentional. Michaels told the agents on the second day that no additional invoices could be produced until he obtained a key to the office; yet the invoices were finally discovered on the third day outside the office in an area of the basement previously inspected by the agent. Furthermore, as the court of appeals points out (Pet. App. B 9-10), Michaels himself testified that, although the agents asked for all the invoices, he did not look in the drawers where some of the invoices were sometimes kept. There is thus no occasion for the Court to review the sufficiency of the evidence to establish count II.

2. We do not understand the claim of plain error in the instructions to be within the scope of either the remand or petitioners' contentions in the court below. The government's position on this question is fully stated in our brief in opposition to the first petition for certiorari, No. 571, O.T. 1963. As we there pointed out, the jury was charged that petitioners were to be acquitted unless they "knowingly failed and refused to produce" the records (Tr. 251-253). There was no attempt to suggest that the statute imposes criminal liability regardless of intent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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